United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2630

In the

UNITED STATES COURT OF APPEALS

for the Second Circuit

B P/S

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC.; BRUCE E. RAPKINE; and SAMUEL RAPKINE,

Plaintiffs,

v.

IMMIGRATION AND NATURALIZATION SERVICE; LEONARD T. CHAPMAN, Commissioner, Immigration and Naturalization Service, in his official and personal capacity; JAMES T. GREENE, Deputy Commissioner, Immigration and Naturalization Service, in his official and personal capacity; NORTHEAST REGIONAL OFFICE, Immigration and Naturalization Service; SOCRATES P. ZOLOTAS, Regional Commissioner, Northeast Regional Office, Immigration and Naturalization Service, in his official and personal capacity; DISTRICT #3, NEW YORK CITY DISTRICT OFFICE, Immigration and Naturalization Service; SOL MARKS, District Director, District #3, New York City District Office, Immigration and Naturalization Service, retired, in his official and personal capacity; JOHN DOE, District Director, District #3, New York City District Office, Immigration and Naturalization Service, in his official and personal capacity,

Defendants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AND APPENDIX OF APPELLANTS

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC.; BRUCE E. RAPKINE; and SAMUEL RAPKINE

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STATEMENT OF THE CASE

This case is a civil action brought in the United States District Court for the District of Vermont, and, pursuant to an order changing venue, argued in the United States District Court for the Southern District of New York. Appellants seek a declaration of their rights and injunctive relief from actions of the Immigration and Naturalization Service.

During a hearing upon a motion for a preliminary order enjoining the Service from restricting New York X-Ray's right to conduct serology and x-ray examinations of aliens, New York X-Ray alleged that the Service amended and implemented one of its regulations in disregard of equal protection and due process of law and in violation of the Administrative Procedure Act. New York X-Ray also alleged that as a consequence of this illegal action, it had suffered substantial financial loss.

The District Court, Kevin Thomas Duffy, D.J., presiding, denied Appellants' motion for a preliminary injunction. It is from the denial of this motion that New York X-Ray appeals.

STATEMENT OF FACTS

For approximately twenty-five years, until August 1, 1973, New York X-Ray administered serology and x-ray examinations to prospective resident aliens. The Immigration and Naturalization Service required aliens to submit results of these examinations as a portion of a physical examination necessary to obtain permanent landed status.

New York X-Ray conducted these examinations with the knowledge and often upon the direct request of the Service. (Verified Complaint, p. 3-A; Plaintiff's Affidavit, pp. 12-A, 13-A). The Service frequently asked for "same-day" or twenty-four-hour service for an alien, often requested test results over the telephone, and sometimes requested New York X-Ray to conduct additional testing for aliens suspected of carrying tuberculosis. (Verified Complaint, p. 3-A; Plaintiff's Affidavit, pp. 12-A, 13-A). New York X-Ray is a facility approved by a "state or local health department" and is, therefore, among the group of laboratories which met the Service's criteria for examination of aliens prior to August 1, 1973 (Plaintiff's Affidavit, p. 12-A).

As of August 1, 1973, District #3 of Region #1 of the Service refused to accept New York X-Ray's examination results. Beginning on that date, the Service referred aliens to facilities included on a new list compiled by District #3. Now, only test results of listed laboratories are acceptable to District #3 of Region #1 of the Service. However, New York

Statement of Facts

X-Ray's test results continue to be acceptable to all other districts in various states, including New York State, in Region #1 and other regions.

Initially, the Service alleged that the new list was promulgated pursuant to an amendment of 8 C.F.R. §234.2(b). (Verified Complaint, p. 7-A). However, at the hearing of the United States District Court, the Service conceded that 8 C.F.R. §234.2(b) was not published in the Federal Register until November 30, 1973. (38 Fed. Reg. §33062, p. 16-A). Furthermore, the Service amended this regulation and promulgated its list of approved laboratories without any notice whatsoever to New York X-Ray (Verified Complaint, pp. 3-A, 4-A, 8-A, 9-A).

In response to New York X-Ray's inquiries, the Service explained that various criteria were used to determine which facilities would be chosen for the new list, and that when the Director of District #3 "found a minimum number of facilities capable of meeting these criteria he ceased to designate additional laboratories". (Verified Complaint, pp. 4-A, 5-A, 7-A). The criteria applied by the Service included geographical convenience, ability to perform both serology and x-ray tests as well as actual medical examinations, possession of sufficient equipment so that if possible only a single visit to the laboratory would be necessary, capacity to examine sizable numbers of aliens, and prevention by the facility of fraudulent practices by aliens. (Verified Complaint, pp. 4-A, 5-A).

Statement of Facts

New York X-Ray meets and in many instances exceeds these criteria, and the Service was so informed. (Verified Complaint, pp. 6-A, 7-A, 8-A; Plaintiff's Affidavit, pp. 13-A, 14-A). In comparison, almost none of the facilities listed by the Service meets these criteria. (Verified Complaint, pp. 5-A, 6-A; Plaintiff's Affidavit, pp. 13-A, 14-A).

The only other difference between New York X-Ray and facilities approved by the Service is that New York X-Ray is an independently owned laboratory, whereas thirty of the thirty-two approved facilities are owned and operated by only two corporations; one corporation owns three laboratories, and the remaining corporation owns twenty-seven laboratories. (Verified Complaint, p. 9-A).

Notwithstanding its request, New York X-Ray has not been allowed to compete on an equal basis with other facilities for a position on the list of approved laboratories.

ISSUES

1. Was the court in error when it concluded that the Service was not required to observe the Administrative Procedure Act while enacting 8 C.F.R. §234.2(b), and did the court err in failing to decide that the Service violated the Administrative Procedure Act as it implemented 8 C.F.R. §234.2(b)?

2. Did the court err in concluding that New York X-Ray had no property rights entitled to due process of law, and that, in any event, even if such rights did exist, the Service's actions did not interfere with New York X-Ray's ability to solicit and conduct business?

3. Was the court in error when it concluded that New York X-Ray was not entitled to equal protection of law pursuant to the Fifth Amendment of the Constitution?

ARGUMENT

I. THE COURT ERRED IN CONCLUDING THAT APPELLEES WERE NOT REQUIRED TO COMPLY WITH THE ADMINISTRATIVE PROCEDURE ACT.

The court held that the Service was not required to comply with the Administrative Procedure Act (5 U.S.C. §553, p. 17-A) for two reasons; first, the Service was merely changing agency procedure by amending 8 C.F.R. §234.2(b) and was not affecting New York X-Ray's substantive rights; second, New York X-Ray was not a member of a regulated industry which was substantially affected by the Service's change in its procedure. (Opinion, p. 21-A).

Contrary to the court's opinion, and for reasons best stated by the Service, 8 C.F.R. §234.2(b) was originally adopted and then amended for the sole purpose of regulating the industry which conducts physical examinations of aliens. As the Service noted, 8 U.S.C §1224 (1952) specifically provides for the employment of civil surgeons to conduct medical examinations of aliens (Defendants' Memorandum, p. 15-A), and:

> "...more specifically, pursuant to the authority granted to prescribe regulations for the employment of civil surgeons, the Attorney General issued the regulation set forth in 8 C.F.R. §234.2(b). That regulation prescribes the terms for the selection of civil surgeons or clinics employing qualified civil surgeons to conduct medical examinations of aliens." [Emphasis supplied]. (Defendants' Memorandum, p. 15-A).

Two cases support New York X-Ray's contention that if a federal agency, acting pursuant to the United States Code,

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implements a rule which regulates a complainant's ability to conduct its business, then that agency must comply with the Administrative Procedure Act. Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C.Cir. 1971); Pharmaceutical Mfrs. Assn. v. Finch, 307 F.Supp. 858 (D.Del. 1970).

In Blackwell, the Service sought to revoke the right of a college to educate non-immigrant aliens. The court concluded that the procedure used by the Service, pursuant to authority in the United States Code and Code of Federal Regulations, violated the Administrative Procedure Act. Blackwell, at 934. Significantly, the court held that the Service's interest in protecting aliens did not justify denial of the college's rights. Instead, the court said:

> "...the protection of the interest of bona fide non-immigrant students, proper enforcement of the immigration laws, and the promotion of better relations with other countries...can just as easily be protected by better procedures." Blackwell, at 935 n. 11.

Therefore, it was error for the District Court to conclude that New York X-Ray is not regulated by the United States Code and the Code of Federal Regulations, and it was error to conclude that the Service's need for "a more efficient way...to process ...applications" justifies the Service's failure to comply with the Administrative Procedure Act.[1] (Opinion, p. 21-A).

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[1] The court's reliance upon Ranger v. Fed. Communications Comm'n., 294 F.2d 240 (D.C.Cir. 1961) (Opinion, pp. 21-A, 22-A), is ill-founded. The F.C.C. changed a date for filing of a

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Notwithstanding that the court considers the amendment of 8 C.F.R. §234.2(b) merely a procedural change (Opinion, p. 21-A), there is ample authority which establishes that:

> "[t]he particular label placed upon [agency action] is not necessarily conclusive, for it is the substance of what the [agency] has purported to do, and has done which is decisive." Columbia Broadcasting System v. United States of America, 316 U.S. 407, 416 (1961).

As the court said in Pharmaceutical Mfrs. Assn. v. Finch, supra:

> "Attempting to provide a facile semantic distinction between [a] '...procedural' rule on the one hand and a 'substantive' rule on the other hand does little to clarify whether the regulations... are subject to the notice and comment provisions of §4 of the Administrative Procedure Act." P.M.A., at 863.

Therefore, the court sought to avoid self-serving characterizations and noted instead that:

> "The basic policy of §4 at least requires that when a proposed regulation of general applicability has a substantial impact on a regulated industry, or an important class of the members..., notice and opportunity for comment should first be provided." P.M.A., at 863.

The Service said that 8 U.S.C. §1224 and 8 C.F.R. §234.2 (b) were written to regulate employment of physicians and clinics. (Defendants' Memorandum, p. 15-A). Case law requires

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license application but plaintiff failed to meet the deadline solely because his application lacked sufficient information. The court said, "...An applicant for a...license who either ignores or fails to understand clear and valid rules...for an application assumes the risk that the application will not be acceptable...." At 242. Had plaintiff provided the necessary information on time, his substantive rights would not have been affected. In our case, there is no action which New York X-Ray could have taken to protect its substantive rights.

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an agency to comply with the Administrative Procedure Act if its regulations affect an owner's ability to conduct business. Blackwell, and P.M.A., supra. Therefore, the Service should not be allowed to violate the Administrative Procedure Act merely because it characterizes its substantive rule changes as procedural changes. So long as the Service's rule change seriously disrupts New York X-Ray's business, the Service must comply with 5 U.S.C. §553 (pp. 17-A, 18-A).

The court also failed to note that even if the Service enacted 8 C.F.R. §234.2(b) without violating the Administrative Procedure Act, nevertheless the Act was violated as the regulation was applied to New York X-Ray.

The Administrative Procedure Act defines a license as "the whole or a part of an agency permit,...approval, or other form of permission". (5 U.S.C. §551(8), p. 17-A). And, the Act requires that if an:

> "application is made for a license required by law, the agency, with due regard for the rights and privileges of all interested parties or adversely affected persons,...shall [proceed]...in accordance with sections 556 and 557 of this title...and shall make its decision." (5 U.S.C. §558(c), p. 20-A).

Since August 1, 1973, the Service has accepted test results only from clinics on its approved list. Need for such approval emanates from 8 C.F.R. §234.2(b) and the approval constitutes a "license" as defined in the Administrative Procedure Act. Because this license is required by law, the Service should have invited applications, complied with §556 and §557 of the Act and

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decided which clinics would receive approval.

Instead, the Service secretly approved facilities without providing any procedure required by the Act. Four months prior to amending its regulation to allow such licensing, the Director of District #3 contacted a number of clinics, and "when he found the minimum number capable of performing, he ceased designating additional laboratories." (Verified Complaint, p. 7-A).

As a result of the Service's selection process, there is no record in which reasons, material facts or relevant law upon which the Service relied may be found. The absence of such a record is a violation of the Act. (5 U.S.C. §556, §557, pp. 18-A, 19-A).

As the Court said in S.E.C. v. Chenery Corp., 318 U.S. 80 (1942):

> "The Commission's action cannot be upheld merely because findings might have been made...which would justify its order...." At 94; accord, Boudin v. Dulles, 235 F.2d 532 (1956).

Therefore, even if the Service could establish a valid basis for choosing some facilities to the exclusion of New York X-Ray, its decision may not be upheld in the absence of a required record of its proceedings.

ARGUMENT

II. THE COURT ERRED IN CONCLUDING THAT NEW YORK X-RAY DID NOT HAVE A PROPERTY RIGHT PROTECTED BY DUE PROCESS OF LAW.

The court held that New York X-Ray was not entitled to due process of law because, it said, "Plaintiffs had no property right in the medical examination of aliens." (Opinion, pp. 22-A, 23-A). The court noted that, "[n]o statute ever gave New York X-Ray...the right to examine aliens" (Opinion, p. 23-A), New York X-Ray has not established that the right to conduct its business is protected by due process of law (Opinion, p. 24-A), and the Service has not interfered with New York X-Ray's right to conduct its business (Opinion, pp. 24-A, 25-A).

In emphasizing the absence of a statutory grant of authority to New York X-Ray to conduct examinations, the court added a dimension to the "legitimate claim of entitlement" mentioned in Board of Regents v. Roth, 408 U.S. 564, 577 (1972). However, Roth does not stand for the proposition that a claim of entitlement must be traceable to a statute. Statutes are merely one method of establishing "rules or understandings...that support claims of entitlement...." Roth, at 577. The Court overlooked the possibility that such "rules or understandings" may be implied by the conduct and circumstances surrounding the dealings of the parties. Perry v. Sindermann, 408 U.S. 592, 601-02 (1972), citing 3 Corbin on Contracts, §§561-672-A (1960).

New York X-Ray alleged such conduct and circumstances. With the knowledge, approval, and express request of the

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Service, New York X-Ray has conducted serology and x-ray examinations of prospective resident aliens for more than twenty-five years. The Service, by its employee, Dr. Duran, M.D., frequently requested twenty-four-hour or same-day service for some aliens, and also requested New York X-Ray to perform cultures and gastric content tests for alien applicants. On many occasions, the Service requested "over-the-phone" results from New York X-Ray which were confirmed in writing at a later date. (Verified Complaint, p. 3-A; Plaintiff's Affidavit, pp. 12-A, 13-A). This conduct by the Service which continued for a twenty-five-year period without any stated termination date constitutes an implied agreement between the Service and New York X-Ray by which the Service granted New York X-Ray the right to examine aliens. At a minimum, New York X-Ray must be given an opportunity to establish that these actions by the Service support legitimate claims of entitlement to a property interest in future examinations. Sindermann, at 602-03.

The court also rejected New York X-Ray's contention that "freedom to conduct one's business or pursue one's profession without government interference is a right entitled to due process protection". (Opinion, p. 24-A). In so holding, the court rejected precedent for this proposition, Greene v. McElroy, 360 U.S. 474 (1959).

Apparently, the court believed that Greene was inapplicable to this case because the complainant was fired pursuant to terms of a contract between his employer and the government. (Opinion,

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p. 24-A). The emphasis upon a contract is immaterial to an appreciation of either Greene or our case. As the Court said:

> "Respondents admit, as they must, that the revocation of security clearance caused petitioner to lose his job...." Greene, at 492.

And the Court noted:

> "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment...." Greene, at 492.

The importance of Greene is that it prevented governments from illegally interfering with a protected property right. It does not matter that pursuant to a contract government used a private entity to effect the interference. Greene, at 493 n.22. The Court decided that government could not create a clearance program pursuant to which affected persons could lose their jobs "on the basis of fact determinations" unless these persons were granted traditional due process of law. Greene, at 493, 506-07. Citing a host of decisions, the Court said:

> "These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." Greene, at 508.

In all relevant respects, Greene and our case are the same. Both involved an administrative fact-finding which resulted in an unreasonable interference with a protected property interest. In our case, the Service said that administrative requirements necessitated limiting eligible laboratories, and, therefore,

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various enumerated criteria were applied to laboratories until "the minimum number of facilities capable of performing" was found. (Verified Complaint, pp. 4-A, 5-A, 7-A). There is no meaningful distinction between choosing a minimum number of facilities which excludes New York X-Ray and finding, directly, that New York X-Ray is unqualified to examine aliens. In either event, New York X-Ray is denied its property rights.

The court also disregarded United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969). It did so, it said, because Tropiano was "not concerned with due process to be accorded a property interest in the conducting of a business". (Opinion, p. 24-A). The court misconstrued the purpose of citing Tropiano, to wit: to define property and to establish that property is protected by the Fifth Amendment.

In Tropiano, at 1075, the Appellants alleged that the right to solicit business was not "property". But the Circuit Court said:

> "The concept of property under the Hobbs Act... is not limited to physical or tangible property..., but, includes, in a broad sense, any valuable right considered as a source or element of wealth...and does not depend on a direct benefit being conferred on the person who obtains the property...." [Emphasis supplied]. Tropiano, at 1075-76.

And the court said:

> "The right to pursue a lawful business including the solicitation of customers necessary to the conduct of such business has long been recognized as a property right within the protection of the Fifth Amendment...of the Constitution...." Tropiano, at 1076.

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Even if it were true, for the sake of discussion, that New York X-Ray did not receive its "property" by direct conferral of the Service, nevertheless the Service must provide Fifth Amendment due process of law if its actions interfere with New York X-Ray's solicitation and conduct of business. As the Court in Tropiano remarked, soliciting and conducting business are property rights entitled to protection by the Fifth Amendment and not merely by the Hobbs Act.

Finally, the court concluded that even if New York X-Ray's interpretation of Greene and Tropiano was correct, the decisions are irrelevant because the Service did not interfere with New York X-Ray's right to conduct its business. (Opinion, pp. 24-A, 25-A). Such a conclusion is sophistic. At least fifteen per cent of New York X-Ray's gross income was removed by the Service's action. Appellant Bruce E. Rapkine suffered a twenty-per-cent decline in his personal income in 1974, and Appellant Samuel Rapkine lost eighty-eight per cent of his personal income in 1974. (Verified Complaint, pp. 10-A, 11-A). It has taken New York X-Ray at least twenty-five years to develop this source of income. How, therefore, could the court conclude that the Service did not clearly interfere with New York X-Ray's business?

It is error to say that no interference occurred merely because New York X-Ray is free to continue its business. (Opinion, pp. 24-A, 25-A). If, as the District Court said, this were true, then the government could accomplish any objective

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without constitutional restraint so long as it destroyed property rights only partially. Such a result is clearly inconsistent with the facts and decision in Greene, supra, where an engineer who was illegally fired could have practiced his profession with other employers. The result is also inconsistent with Blackwell College of Business v. Attorney General, supra, where the Immigration and Naturalization Service was enjoined from illegally preventing aliens from attending the college even though the college could have continued to function partially by educating non-aliens.

The controversy in this case is in relevant portion the same as the controversy decided in Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968). In Holmes, the Circuit Court held that when government selects a limited number of qualified tenants from a larger group of applicants, the selections must be based upon an "objective scoring system". Holmes, at 265.

The defects in the Housing Authority's system were these:

> 1. "[No applicant was] advised in writing at any time of his eligibility, or ineligibility...."
>
> 2. "Regulations on admissions...are not made available...either by publication or by posting in a conspicuous place."
>
> 3. "Applications are not processed chronologically, or in accordance with ascertainable standards, or in any other reasonable or systematic manner."
>
> 4. "There is no waiting list or other device by which an applicant can gauge the progress of his case...."

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5. "Many applications are never considered.... If and when a determination of eligibility is made... the candidate is not informed of the...decision, or of the reasons therefor." Holmes, at 264.

Each of these defects applies equally to the Service's action in this case. Therefore, the Circuit Court's conclusion should be borne in mind:

> "It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency vested with the administration of a vast program,... would be an intolerable invitation to abuse.... For this reason alone due process requires that selections among applicants be made in accordance with 'ascertainable standards'...." Holmes, at 265, citing Hornsby v. Allen, 326 F.2d 605, 612 (5th Cir. 1964).

ARGUMENT

III. APPELLEES DENIED APPELLANTS EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FIFTH AMENDMENT, AND THE DISTRICT COURT ERRED IN FAILING TO SO HOLD.

The District Court failed to consider any issue of equal protection "since the state action requirement of the Fourteenth Amendment is not met". (Opinion, p. 25-A). Such failure was reversible error.

There is ample precedent in the United States Supreme Court which says that although the Fifth Amendment of the Constitution does not in so many words contain an equal protection clause, the Federal Government may not create an irrational classification which denies equal protection of law in violation of the Fifth Amendment. Johnson v. Robison, 415 U.S. 361 (1974); United States Dept. of Agri. v. Moreno, 413 U.S. 528 (1973). In Robison, the Court said that:

> "Although 'the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process ....' ' Thus if a classification would be invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Robison, at 364 n. 4, citing Schneider v. Rusk, 377 U.S. 163, 168 (1964).

Therefore, to determine if action by the Federal Government denies equal protection of law pursuant to the Fifth Amendment, one need only ask if that same action, taken by a state, would violate the equal protection clause of the Fourteenth Amendment. If the answer is yes, then the Federal Government's action violates the "equal protection component of

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the Due Process Clause of the Fifth Amendment". Moreno, at 533.

It is not difficult to understand that the Supreme Court would find an "equal protection component" in the Fifth Amendment. Such a finding is natural in light of the language of Chief Justice Warren who said that:

> "...concepts of equal protection and due process, both stemming from the American ideal of fairness, are not mutually exclusive."
>
> "In view of our decision that the Constitution prohibits the states from [denying equal protection of law], it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Bolling v. Sharpe, 347 U.S. 497, 499, 500 (1954).

Consequently, the District Court's summary disregard of equal protection arguments in this cause cannot be justified by controlling precedent.

Review of this case reveals that the Service denied New York X-Ray equal protection of law by enacting a regulation which is too vague on its face to satisfy the requirements of equal protection. The Supreme Court has held that where Government has a "practice" of issuing licenses, the practice must be controlled by strict standards, lest Government deny equal protection guaranteed by the Fourteenth Amendment. Niemotko v. Maryland, 340 U.S. 268 (1950). Such denial occurs when the licensing procedure is a "...completely arbitrary and discriminatory process". Niemotko, at 273.

The Niemotko decision proscribed denial of equal protection of law to those who wished to gather in public parks and discuss

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the Bible. However, the Court made no attempt to distinguish freedoms of speech, assembly and religion from other rights which are also jeopardized by denial of equal protection of law, and it is New York X-Ray's contention that Niemotko is not limited to the specific rights mentioned in the decision. The impact of Niemotko must be that if a regulation does not "circumscrib[e]...absolute power..." and prevent "limitless discretion...", it violates the Constitution. Niemotko, at 272.

In Smith v. Ladner, 288 F.Supp. 66 (S.D.Miss. 1968), the court summarized the major decisions which in toto say that it is unconstitutional for a government official to exercise arbitrary and absolute discretion in granting or denying rights and privileges. In Smith, a state statute was challenged for vesting "unconstitutionally broad discretion in the Governor to grant or deny...charters". The statute gave government the right to deny a corporate charter solely because licensing the corporation was not "in the best interest of the State of Mississippi", notwithstanding that the corporation's application complied with Mississippi's constitution and law. Smith, at 67 n. 2.

The court declared the statute unconstitutional, ordered that plaintiff receive a charter and noted that:

> 1. Since the statute provided no standards to regulate approval or disapproval, the discretion granted was unlimited in scope and consequently unconstitutional especially in the light of Yick Wo v. Hopkins, 118 U.S. 356 (1886). Smith, at 68.

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2. In the absence of specific standards for "granting or denying a charter, all charters which comply with the statute...must be granted". See Hornsby v. Allen, 326 F.2d 605, 612 (5th Cir. 1964). Smith, at 69.

3. A standard which is defined as the "best interest of the State of Mississippi" is "so vague as to be unconstitutional on its face" even if it did not "grant absolutely unlimited discretion...". See Staub v. Baxley, 355 U.S. 313 (1958). Smith, at 69.

In our case, 8 C.F.R. §234.2(b) (1973) says that the "District Director shall select as many...clinics..., as he determines to be necessary to serve the needs of the Service...". Therefore, the District Director must determine "needs" whatever he, at his sole whim, thinks they are, and then he, acting with unbridled discretion again, arbitrarily selects enough clinics to meet the Service's "needs".

How the Director determines the number of clinics necessary to meet "needs" is also for our speculation, as is the method by which some clinics are chosen to the exclusion of others. Note that the District Director is not even held to the insufficient standard of "best interest" of the Service. In the light of Niemotko and Smith, and decisions cited therein, it is clear that the Service's regulation is too vague on its face to provide equal protection of law and should, therefore, be declared void.

If the court requires additional persuasion that the Service's regulation denies New York X-Ray equal protection of law, then perhaps such persuasion may be found in Yick Wo v.

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Hopkins, supra. Special attention is called to a particular principle in that decision. The Court said that:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." [Emphasis supplied]. Yick Wo, at 373-74.

Thus the Court held that equal protection of law may be denied by the manner in which a regulation is implemented as well as the manner in which it is written. If the government's administration of a regulation is shown by the facts to be unequal and oppressive as to a particular class, then, notwithstanding the intent of the regulation, it must be concluded that the class was denied equal protection of law. Yick Wo, at 373.

It is eminently clear upon examination of the Verified Complaint and Affidavits that New York X-Ray is among a class of clinics which should be protected as the laundries were protected in Yick Wo. The only distinction between New York X-Ray and clinics on the Service's approved list is that New York X-Ray is not owned by one of the two corporations whose facilities occupy thirty of the thirty-two positions meeting the Service's approval. Only two facilities on the Service's list are independently operated. (Verified Complaint, p. 9-A). This fact is uncontested.

In all other respects, New York X-Ray is identical to

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clinics in the Service's approved class or New York X-Ray meets higher standards of qualifications than approved clinics. On the other hand, most approved clinics fail to meet the Service's minimum standards. (Verified Complaint, pp. 4-A, 5-A, 7-A, 8-A, 9-A, 10-A; Plaintiff's Affidavit, 7/23, pp. 13-A, 14-A).

Therefore, because it is too vague upon its fact, and because it is arbitrarily administered, the Service's regulation denies New York X-Ray equal protection of law.

CONCLUSIONS

The Appellants submit:

1. The District Court erred as a matter of law when it concluded that the Service was not required to comply with the Administrative Procedure Act while enacting 8 C.F.R. §234.2(b), and the District Court erred as a matter of law in failing to conclude that the Service violated the Administrative Procedure Act as it applied 8 C.F.R. §234.2(b).

2. The District Court erred as a matter of law in deciding that New York X-Ray had no property rights entitled to protection of due process of law, and that, in any event, even if such rights did exist, the Service did not interfere with New York X-Ray's ability to solicit and conduct business.

3. The District Court erred as a matter of law by concluding that New York X-Ray was not entitled to equal protection of law pursuant to the Fifth Amendment of the Constitution.

4. No genuine issue of any material fact has been raised by Appellees, and this case may be decided solely upon questions of law.

WHEREFORE, Appellants pray that this Court:

1. Reverse the order of the District Court denying Appellants a preliminary injunction.

2. Grant Appellants a judgment declaring that their rights have been violated and issue an injunction permanently enjoining such violations.

3. Grant Appellants a preliminary injunction in the event

Conclusions

that further issues require resolution by any court or agency.

4. Remand this case for further hearing upon the issue of damages.

Respectfully submitted,

NEW YORK PATHOLOGICAL AND
X-RAY LABORATORIES, INC.;
BRUCE E. RAPKINE;
and SAMUEL RAPKINE

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APPENDIX

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2630

From the United States District Court

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC., et al,

Plaintiffs,

v.

IMMIGRATION AND NATURALIZATION SERVICE, et al,

Defendants.

The following is a quotation of the appropriate entries in the United States District Court for the Southern District of New York so far as applicable to this appeal:

1. July 15, 1974 - Filed Order transferring action from the United States District Court, District of Vermont, to the Southern District of New York, together with original papers filed in the Vermont District:

Motion for Declaratory Judgment
Summons and Order for Notice and Proof of Delivery
in part
Memorandum in Support of Injunctive Relief

2. July 17, 1974 - Filed Order to Show Cause why an order should not be entered preventing defendants from excluding the name of New York Pathological and X-Ray Laboratories, Inc., from performing serology and x-ray examinations, etc.

Relevant Docket Entries

3. October 23, 1974 - Filed Opinion #41,352.

4. December 4, 1974 - Filed Plaintiffs' Notice of Appeal from order denying a preliminary injunction entered October 23, 1974.

5. December 11, 1974 - Filed Defendants' Memorandum of Law in opposition to motion for a preliminary injunction.

6. December 11, 1974 - Filed Plaintiffs' Affidavit in support of injunctive relief.

EXCERPTS OF VERIFIED COMPLAINT

[6] 22. During the approximately twenty-five (25) years that plaintiff has conducted serology and x-ray examinations for prospective resident aliens, it has provided service of high quality in the least possible time for its clients. With only week ends excepted, plaintiff provides its results within twenty-four (24) hours of the examination if requested, and if an emergency arises, plaintiff renders its results during the same business day as the examination was given.

23. Plaintiff has always enjoyed an excellent reputation amongst attorneys and physicians who refer aliens for necessary examinations, agencies who assist aliens applying for permanent resident status, and most notably the defendant, DISTRICT #3, NEW YORK DISTRICT OFFICE. On innumerable occasions, defendant, DISTRICT #3, has telephoned plaintiff and requested plaintiff to provide an alien with twenty-four-(24)-hour or "same day" service. Plaintiff has always co-operated in these requests.

[7] 25. In late July and early August of 1973, plaintiff learned that the defendant, NEW YORK DISTRICT, would no longer accept examination results conducted by plaintiff and presented to defendant, DISTRICT #3, by aliens as part of their application for permanent landed status.

26. However, it was not the defendants who so informed plaintiff. Instead, plaintiff received several telephone messages from attorneys and agencies who informed plaintiff

Excerpts of Verified Complaint

that defendants had circulated a list of clinics which could henceforth conduct the identical examinations which plaintiff had always administered. Plaintiff was not on this list.

27. Defendants never informed plaintiff of their intention to publish such list, nor did defendants inform plaintiff that it could no longer conduct its usual business. Even to this time, defendants have not provided plaintiff with the list of presently authorized facilities.

[8] 30. Defendant, ZOLOTAS, replied by letter on December 14, 1973, and stated that:

A. As of August 1, 1973, the defendants' regulations were altered because defendants assumed responsibility for medical examinations from the United States Public Health Service.

B. Administrative requirements of defendants necessitated limiting eligible laboratories who could continue to conduct their business.

C. Therefore, defendant, MARKS, was "requested to designate as few [facilities] as possible consistent with the needs of the Service."

31. The considerations applied to choosing these facilities, mentioned by defendant, ZOLOTAS, in his letter of December 14, 1973, were:

A. Geographical convenience for the alien.

B. Capability to perform x-ray and serology

Excerpts of Verified Complaint

tests as well as the actual medical examination.

C. Possession of equipment which produced rapid results, so that to the extent possible, only a single visit to the facility by the alien is necessary.

D. Capacity to accommodate sizable numbers of aliens, including sufficient staff for year-round operation.

[9] E. Prevention of fraudulent substitution of results by testing and medical examinations occurring at the same facility.

32. Subsequent to receiving defendant ZOLOTAS' letter, plaintiff contacted each of the thirty-two (32) facilities on defendants' approved list. Plaintiff, by an employee, asked each facility:

A. The number of days necessary to obtain results of the x-ray, serology and physical examination.

B. The necessary number of visits to the facility.

C. Whether or not an appointment was required.

33. The results of this survey are these:

A. Eighteen (18) facilities required an appointment.

Excerpts of Verified Complaint

B. One (1) facility provided "same day" results.

C. Six (6) facilities provided results in one (1) or two (2) days.

D. Seventeen (17) facilities took between three (3) and five (5) days to provide results.

E. Six (6) facilities provided results in seven (7) days.

F. One (1) facility took greater than one (1) week to provide results.

G. One (1) facility did not do the work at all and merely referred the alien to another facility.

H. Seven (7) facilities required two (2) visits by the alien.

In addition, twenty-seven (27) of the facilities indicated, contrary to the requirements of eligibility listed by defendant, [10] ZOLOTAS, that their blood test results were not performed at their locations and, therefore, the alien would have to wait for the results to be returned.

34. On or about January 14, 1974, in a meeting with defendant, ZOLOTAS, counsel to plaintiff informed defendant that plaintiff's survey showed substantial non-compliance with defendants' criteria. Counsel further represented that plaintiff was prepared to meet or exceed the criteria determined by defendants or criteria presently observed by eligible facilities,

Excerpts of Verified Complaint

and requested that plaintiff, therefore, be added to defendants' list of eligible laboratories.

35. Two (2) months later, on or about March 11, 1974, plaintiff, not yet having received a response, wrote to defendant, ZOLOTAS, repeating its request to be placed on the eligible list or that the list be eliminated. Plaintiff also requested that it be allowed to compete for a position on the list on a basis equal with other laboratories.

36. Two (2) weeks later, on or about March 26, 1974, defendant, ZOLOTAS, replied and said:

A. Laboratories were appointed to the list pursuant to 8 C.F.R. 234.2(b)

B. Defendant, MARKS, District Director of District #3, New York City, made contact "with a number of facilities...." When he "found the minimum number of facilities capable of performing,...he ceased to designate any additional laboratories."

C. "The selected facilities have been providing satisfactory services..."

Defendant, ZOLOTAS, failed to address himself to the issue of equal competition for a position on the list. His only reference to this matter is found in B of this paragraph, above.

[12] 40. Concerning the operation of plaintiff's business, the following should be recognized:

A. Plaintiff processes all of its serology and x-ray examinations on its own premises.

Excerpts of Verified Complaint

[13] No work is ever sent to any other facility.

B. Plaintiff never requires an appointment of any of its clients because it has sufficient physical facilities and staff to meet any realistic need at any time of the year, five and one-half (5-1/2) days per week.

C. Plaintiff is now and was prior to defendants' actions situated within two (2) streets of Grand Central Railroad Terminal and every subway and bus line connecting all mass transportation facilities in the City of New York. Plaintiff is located within four (4) blocks of the Port Authority Bus Terminal.

D. Plaintiff has never been in any way involved in any breach of security referred to by defendants. In fact, plaintiff developed its own security systems without a request from defendants to do so and without defendants' aid.

E. Plaintiff, therefore, meets or exceeds every consideration expressed by defendants as the basis used for inclusion in the select group of eligible laboratories.

41. Concerning the conduct of defendants' affairs, it must be remembered that upon information and belief:

A. Defendants gave no notice to plaintiff of their intention to change their rules.

B. Defendants by their own admission instituted these regulations on August 1, 1973. However,

Excerpts of Verified Complaint

defendants did not publish their regulation, i.e., provide even constructive notice required by law, until November 30, 1973, when the Code of Federal Regulations carried the "Minor [14] Corollary Amendment" of Section 234.2. The amendment, C.F.R. said, did not require "notice of proposed rule making" because this change related merely to "agency procedure".

C. Defendants placed thirty-two (32) laboratories on their list of eligible facilities. Of these, twenty-seven (27) are affiliated with the Health Insurance Plan of Greater New York (HIP), and three (3) are owned by Life Extension Institute, Inc. Only two (2) facilities are independent.

D. The twenty-seven (27) HIP facilities are the same twenty-seven (27) laboratories which do not perform their tests on their own premises and, therefore, directly violate at least one (1) of the defendants' criteria for eligibility to submit results to defendant, DISTRICT #3.

E. Twenty-six (26) of the twenty-seven (27) HIP facilities appointed by defendants take between three (3) days and greater than one (1) week to process their tests, and nineteen (19) of the HIP laboratories require an appointment. For both of these reasons, these laboratories do not match plaintiff's or defendants' standards of performance.

Excerpts of Verified Complaint

Nonetheless, defendants consider that these laboratories are performing adequately, whereas defendants apparently believe that plaintiff would not so perform.

F. In some states, within defendant, NORTHEAST REGION, including New York State outside DISTRICT #3, Connecticut, Maryland and New Jersey, aliens are permitted to obtain their serology and x-ray results and their physical examinations at different facilities. This policy [15] is totally inconsistent with defendants' professed need to prevent "fraudulent substitutions" of results.

G. Two (2) of defendants' approved facilities are within two (2) blocks and one (1) is within four (4) blocks of plaintiff's premises. Yet, defendants have never revealed how these facilities are more convenient to aliens than is plaintiff's laboratory.

42. The financial impact of defendants' actions upon plaintiff has been drastic and may be summarized as follows:

A. For the first seven (7) months of 1973, plaintiff's gross income from alien clients was 18.3% or Thirty-one Thousand Five Hundred Dollars ($31,500.00) of its total gross income.

B. In the last five (5) months of 1973, i.e., subsequent to defendants' new list, plaintiff's gross income from alien clients was 4% or Three Thousand Seven Hundred Dollars ($3,700.00) of its total gross income.

Excerpts of Verified Complaint

C. As a result of this marked loss of income, plaintiff, BRUCE E. RAPKINE, anticipates a 20% loss of personal income in 1974, in comparison with 1973, based upon first-quarter projections for this year.

D. As a further result of this marked income reduction, plaintiff SAMUEL RAPKINE, has reduced his salary to Forty-five Dollars ($45.00) per week, and has begun to collect Social Security benefits. He anticipates an 88% loss of personal income from his business in 1974, in comparison with 1973, based upon first-quarter projections for this year.

[16] E. All comparisons of personal income of plaintiffs include a seriously deflated 1973 base, because defendants' actions affected plaintiff as of August 1, 1973. Consequently, plaintiffs' losses may be greater than the aforementioned figures indicate.

EXCERPTS OF PLAINTIFF'S AFFIDAVIT IN SUPPORT OF INJUNCTIVE RELIEF
(dated July 23, 1974)

[2] 4. Defendants' allegation that they never granted plaintiffs the right to conduct x-ray and serology examinations for aliens is wrong. By defendants' actions, described as follows, defendants granted and recognized plaintiffs' right to conduct such examinations.

A. On defendants' forms applied to aliens prior to August 1, 1973, defendants told aliens to obtain x-ray and serology tests from a physician or "state or local Health Department approved laboratory". Plaintiffs have been and continue to be among such approved facilities. Consequently, plaintiffs have always had the right granted by defendants to conduct such tests. Please note Plaintiffs' Exhibit A as evidence of defendants' procedure.

[3] B. Defendants, by a physician, Dr. Duran, M.D., supervising alien medical tests, have on many occasions telephone plaintiffs and asked for "rush" service for an alien requiring x-ray and serology tests. Further, on some occasions, Dr. Duran has asked plaintiffs to perform cultures and gastric content tests for aliens suspected of carrying tuberculosis.

C. On innumerable occasions, unknown employees of defendants telephone plaintiffs and asked for "rush" services similar to those requested by Dr. Duran. Furthermore, if an alien lost his written

Excerpts of Plaintiff's Affidavit in Support of Injunctive Relief

results, defendants' employees often telephoned plaintiffs and requested "over-the-phone" results to be confirmed in writing at a later date.

5. Plaintiffs continue to dispute defendants' allegation that defendants' listed facilities are performing satisfactorily or in accordance with defendants' own criteria. Plaintiffs conducted their second survey of listed laboratories on June 28, 1974, and the results of that survey are these:

A. Twenty (20) facilities required an appointment.

B. One (1) facility provides same-day service.

C. Four (4) facilities provided results in one or two days.

D. Sixteen (16) facilities took between three to five days to provide results.

E. Four (4) facilities provided results in one week.

F. Three (3) facilities test only members of the Health Insurance Plan of Greater New York.

[4] G. Three (3) other listed HIP offices did not answer their telephone despite repeated dialing during the business day.

H. One (1) HIP facility will not perform the required work during July.

I. One (1) facility charges in excess of defendants' listed prices, to wit, $30.75 instead

Excerpts of Plaintiff's Affidavit in Support of Injunctive Relief

of $27.50 or $10.00 if a person under fifteen (15) years of age is tested.

J. All but one (1) facility requires two visits of the alien.

EXCERPTS OF DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO A MOTION FOR A PRELIMINARY INJUNCTION

[8] a. The regulation is valid because it was within the authority of the Attorney General.

The Attorney General is under a Congressional mandate to administer and enforce this country's immigration laws. Section 103(a) of the Immigration and Nationality Act, 8 U.S.C. §1103(a). In performing these functions the Attorney General has the authority to establish regulations as he deems necessary to enforce the provisions of the Act. Section 234 of the Act, 8 U.S.C. §1224, specifically provides that the Attorney General may prescribe terms for employing civil surgeons for the medical examination of aliens.

Pursuant to his general authority to prescribe regulations deemed necessary to enforce the provisions of the Act, and, more specifically, pursuant to the authority granted to prescribe regulations for the employment of civil surgeons, the Attorney General issued the regulation set forth at 8 C.F.R. §234.2(b). That regulation prescribes the terms for the selection of civil [9] surgeons or clinics employing qualified civil surgeons to conduct medical examinations of aliens.

EXCERPT OF 8 U.S.C. 1224

Physical and Mental Examinations

If medical officers of the United States Public Health Service are not available, civil surgeons of not less than four years' professional experience may be employed for such service upon such terms as may be prescribed by the Attorney General.

EXCERPTS OF 38 FED. REG. 33062 (November 30, 1973)

8 C.F.R. 234.2

(a) General. When a medical examination is required of an alien who files an application for status as a permanent resident...it shall be made by a selected civil surgeon.

(b) Selection of civil surgeons. When a civil surgeon is to perform the examination, he shall be selected by the district director having jurisdiction over the area of the alien's residence. The district director shall select as many civil surgeons, including clinics employing qualified civil surgeons, as he determines to be necessary to serve the needs of the Service in a locality under his jurisdiction. Each civil surgeon selected shall be a licensed physician with no less than 4 years' professional experience. Officers of local health departments and medical societies may be consulted to obtain the names of competent surgeons and clinics willing to make the examinations.

EXCERPTS OF 5 U.S.C. 551 (1966)

§551. Definitions.

(4) "rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing...procedure, or practice requirements of an agency and includes the approval or prescription for the future of...facilities...or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(8) "license" includes the whole or a part of an agency permit...[or] approval...

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(F) requirement, revocation, or suspension of a license;

EXCERPTS OF 5 U.S.C. 553 (1966)

§553. Rule making.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law....

Except when notice or hearing is required by statute, this subsection does not apply--

Excerpts of 5 U.S.C. 553 (1966)

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose....

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(2) interpretive rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

EXCERPTS OF 5 U.S.C. 556 (1966)

§556. Hearings;...powers and duties;...record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(d) ...A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence....

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title...

EXCERPTS OF 5 U.S.C. 557 (1966)

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) ...When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses--

> (2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) ...

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--

> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record;

EXCERPTS OF 5 U.S.C. 558 (1966)

§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

Excerpts of 5 U.S.C. 558 (1966)

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

EXCERPTS OF OPINION AND ORDER

[4] Plaintiffs argue that the regulation was not instituted in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. §553, which provide for notice of a proposed rulemaking to those subject to the rule, and opportunity to be heard, and publication of the rule at least [5] 30 days before the rule becomes effective. However, where a proposed rule related to agency procedure, the formalities of a rulemaking are not required. 5 U.S.C. §553(b)(3)(A). The regulation directing that aliens applying for permanent resident status be examined by selected civil surgeons rather than by medical officers of the Department of Health clearly relates to agency procedure and is thereby excused from the requirements of a formal rulemaking.

Plaintiffs argue that where a regulation has a "substantial impact on a regulated industry" that a "semantic distinction" will not save a purportedly procedural rule which is, in reality, substantive. Pharmaceutical Mfrs. Ass'n. v. Finch, 307 F.Supp. 858, 862 (D.Del. 1970); see also Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1941). However, the plaintiff laboratory cannot claim to be a regulated industry as were the drug manufacturers in the Pharmaceutical case or the broadcasters in the CBS case. Rather, the class regulated by 8 C.F.R. §234.2(b) is composed of aliens applying for permanent residence. Their substantive rights have in no way been altered. The regulation merely

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provides a more efficient way for the government to process their applications. As was noted in Ranger v. Federal Communications Commission, 294 F.2d 240 (D.C.Cir. 1961):

> [6] "Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." 294 F.2d at 244.

Clearly the regulation involved in the present case fell within the exception of rules relating to "agency procedure" so that an attack on its validity for failure to comply with §553 must fail.

[7] In all three cases cited by the plaintiffs the challenged statutes authorized the making of a factual determination and a consequent deprivation of a right or imposition of a duty without the adherence to due process. No such determination, right, or duty is involved in the present case. Rather, the Attorney General delegated to a local officer the authority to make an administrative selection of civil surgeons. This selection neither imposed a duty on plaintiffs nor deprived plaintiffs of property. As will be discussed below, there is no right to perform medical examinations of aliens. Therefore, no right was abrogated without due process by the regulation. The vagueness argument must fail.

The claim that the effect of the new regulation was to

Excerpts of Opinion and Order

violate the due process rights of the plaintiffs fails by virtue of the same reasoning. The plaintiffs had no property right in the medical examination of aliens.

[8] Among the number of cases cited by plaintiffs for the general proposition that deprivation of liberty or property by the government must be accompanied by due process of law is Board of Regents v. Roth, 408 U.S. 564 (1972). Although the Court in Roth was in accord with this general proposition, it denied the plaintiff, an untenured teacher, relief from his dismissal on the grounds that he had no protected property right or interest in the renewal of his contract. To have such an interest the Court said one must "have a legitimate claim of entitlement to it." 408 U.S. at 577. The Court went on to explain that such a claim of entitlement is created by "rules and understandings that stem from an independent source such as state law." 408 U.S. at 577. No statute ever gave plaintiff laboratory in the case at hand the right to examine aliens. In fact, 8 U.S.C. §1255 gives the Attorney General broad discretion to make rules and regulations for the granting of permanent resident status to aliens.

Plaintiffs cite Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C.Cir. 1971), in which the approval granted to a college authorizing it to receive alien students was revoked without due process of law. Plaintiffs' reliance is ill-founded since the approval, which was granted pursuant

Excerpts of Opinion and Order

to a statute, in Blackwell constitutes just such a [9] property interest as is lacking in the case at hand. Equally unavailing is Bell v. Burson, 402 U.S. 535 (1971), in which a driver's license was revoked in contravention of due process.

Nor can the due process argument succeed on the theory that freedom to conduct one's business or pursue one's profession without government interference is a right entitled to due process protection. In support of such an argument plaintiffs point to Greene v. McElroy, 360 U.S. 474 (1959) in which an aeronautical engineer was fired when his security clearance was revoked. His firing was necessitated by the terms of his employer's contract with the government. The Supreme Court held that the plaintiff was entitled to confront and cross-examine any witnesses against him. Plaintiffs also point for support to United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969), a criminal case under the Hobbs Act in which the defendants were convicted of violating a third person's property right to solicit business when they threatened him with violence should he continue to solicit any of defendant's customers. Tropiano was not concerned with the due process to be accorded a property interest in the conducting of a business. Moreover, it sought to define "property" for purposes of the Hobbs Act rather than the fifth amendment. [10] However, even assuming that the definition of "property" is the same for both purposes, Greene and Tropiano are

Excerpts of Opinion and Order

distinguishable from the present case because they involved clear examples of interference with business; whereas the plaintiffs in the present case remain free to conduct their laboratory business.

As for the equal protection argument, it fails even before its merits are considered since the state action requirement of the fourteenth amendment is not met.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC., et al,

v.

IMMIGRATION AND NATURALIZATION SERVICE, et al.

Civil Action File No. 74-3011

NOTICE IS HEREBY GIVEN that the above-named plaintiffs hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the Order denying a preliminary injunction entered in this action on the 23rd day of October, 1974.

Dated at Burlington, Vermont, this 21st day of November, 1974.

THOMAS AND ALEXANDER
Attorneys for Plaintiffs

By /s/ Edward J. Carroll
A Member of the Firm

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW YORK PATHOLOGICAL AND X-RAY LABORATORIES, INC., et al, Plaintiffs--Appellants, v. IMMIGRATION AND NATURALIZATION SERVICE, et al, Defendants--Appellees.	:	Docket No. 74-2630

AFFIDAVIT OF SERVICE

EDWARD J. CARROLL makes oath to the following:

1. I am a member of the firm of Thomas and Alexander, counsel for Plaintiffs--Appellants in the above-entitled matter.

2. I have this 27th day of February, 1975, served two (2) copies of the Brief and Appendix of Appellants upon counsel for Defendants--Appellees, Mary P. Maguire, Assistant United States Attorney, Southern District of New York, by depositing the same in the United States Mail, postage prepaid, addressed to her at United States Court House, Foley Square, New York, New York 10007.

Dated at Burlington, Vermont, this 27th day of February, 1975.

Edward J. Carroll

EDWARD J. CARROLL

STATE OF VERMONT
County of Chittenden, SS.

Subscribed and sworn to before me this 27th day of February, 1975.

Marianne S. Alexander

Notary Public

My Commission expires Feb. 10,1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW YORK PATHOLOGICAL AND
X-RAY LABORATORIES, INC., ET AL,

v.

IMMIGRATION AND NATURALIZATION
SERVICE, et al.

Docket No. 74-2630

AFFIDAVIT OF SERVICE

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